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HSBC AMANAH MALAYSIA BHD v. SERBA DINAMIK GROUP BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AZLAN SULAIMAN JC
[ORIGINATING SUMMONS NO: WA-24M-2-03-2022]
B 9 SEPTEMBER 2022

Abstract – *The application to dispense with personal service of an order of court could only be entertained by the court where evidence is shown that the person against whom it is made has full knowledge of the order and its terms.*

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CIVIL PROCEDURE: *Service – Personal service – Application to dispense with personal service on directors of company – Application against mandatory order against express requirement of personal service – Whether valid and reasonable grounds presented – Whether dispensation of personal service could be ordered in directors' absence of knowledge of orders and its terms – Whether service on solicitors of company could be accepted as service on directors – Whether just to order dispensation of personal service*

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E The plaintiff obtained an order against the defendants and, in order to compel the second defendant to pay the secured sum as per the Order, the plaintiff included an indorsement under O. 45 r. 7(4) of the Rules of Court ('ROC') and as per Form No. 83(a) of Appendix A to the ROC that the directors of the second defendant would be liable to process of execution in the event the second defendant failed to make the payment. Under O. 45 r. 7(3)(a) of the
F ROC, the Order was to be served personally on the directors. The plaintiff, alleging that it was impractical to serve the order personally on the directors, sought to dispense with personal service on the directors pursuant to O. 45 r. 7(7) of the ROC, and proposed alternative methods of service *in lieu* of personal service. And, after effecting the alternative service, the plaintiff
G intended to pursue an order of committal against the defendants, if, thereafter, they still failed and/or refused to procure the payment by the second defendant of the secured sum to the plaintiff. However, upon the defendants' solicitors' subsequent confirmation that the firm had the instruction to accept service for and on behalf of the defendants, the
H plaintiff's application was withdrawn and was accordingly struck out. The court nevertheless rendered its decision on the issues raised in this case.

Obiter:

(1) Parties seeking to dispense with service of a mandatory order against the
I express requirement of personal service under O. 45 r. 7(3) must adduce valid and reasonable grounds for establishing that it would be just to do so, more so, in this instance where the intended next step was committal proceedings. There was no evidence that the directors, save for one of

them, had full knowledge of the Order and its terms. As such, the court would not order the dispensation of personal service of the Order against them. (paras 21, 23 & 24)

(2) Service on the solicitors of the company could not be accepted as service on its directors as: (i) a company and its directors are separate legal entities; service on solicitors appointed by a company does not mean they are also the directors' solicitors, even if they are being instructed by them; and (ii) under O. 62 r. 13 of the ROC, a solicitor would only be authorised to accept service of cause papers in an action where the opposite party has been given notice in writing to that effect, either by the party or by the solicitors. Absent such notice, the defendants' solicitors would have no such authority and any service on them would not be good and valid service on the directors. (paras 25-27)

(3) The purport and ambit of O. 52 r. 4(4) and O. 45 r. 7(7) is the same, namely, that personal service may be dispensed with if the court or judge 'thinks it just to do so'. This court has no power or jurisdiction to dispense with the service of the cause papers in the committal proceedings. The court's remit was confined to deciding whether to dispense with personal service of the Order, under O. 45 r. 7(7) of the Rules. Further, the intended committal proceedings resulting from any failure by the directors to comply with the Order was something for the future, under entirely different proceedings under O. 52, which has its own process. Ordering the dispensation with service of the cause papers on the committal proceedings now would amount to exceeding the court's current remit and impinging on and usurping the discretion, powers and jurisdiction of the court hearing those committal proceedings. Hence, the application was dismissed. (paras 31, 32, 34, 35, 38 & 39)

Case(s) referred to:

AXA China Region Insurance Co Ltd v. Li Yu Ping Ellen [2002] 3 HKC 339 ***(dist)***
Davy International Ltd & Ors v. Tazzyman & Ors [1997] 3 All ER 183 ***(dist)***
Madlis Azid & Ors v. Chua Yung Kim & Ors [2013] 2 CLJ 110 HC ***(dist)***
Neptune Aviation Ltd v. Sheikh Salleh Sheikh Abod & Anor (No 3) [2019] 4 CLJ 408 HC ***(dist)***
OCM Opportunities Fund II, LP & Ors v. Burhan Uray (alias Wong Ming Kiong) & Ors [2005] 3 SLR(R) 60 ***(dist)***

Legislation referred to:

Rules of Court 2012, O. 45 rr. 5, 7(3)(a), (4), (7), O. 52 rr. 3(1), 4(1), (3), (4), O. 62 rr. 5, 13

For the plaintiff - Benjamin John Dawson & Tang Kah Weng; M/s Benjamin Dawson
For the defendants - Sandra Tan Xue Qi; M/s Syed Ibrahim & Co

Reported by S Barathi

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JUDGMENT

Azlan Sulaiman JC:

Overview

[1] This judgment deals with, *inter alia*, an application under O. 45 r. 7(7) B of the Rules of Court 2012 ("the Rules") to dispense with personal service on the directors of a company of a mandatory order that was made against the company.

Salient Background Facts

C **[2]** On 30 May 2022, I allowed the plaintiff's originating summons filed herein and made the following order ("the order"):

(1) A declaration that the Plaintiff is the equitable charge of 40% shares in Konsortium KAJV Sdn Bhd obtained by the 2nd Defendant under a Share Sale Agreement dated 20 February 2017 ("the Target D Shares") as security for the banking facility granted by the Plaintiff to the 1st Defendant pursuant to the Facility Offer Letter dated 24 March 2017, Facility Agreement dated 25 May 2017 and Amending Facility Agreement dated 23 July 2018 ("the Facility") from the date it acquired the Target Shares up until on 18.3.2022 being the date of the registration of Mirmas Holding Sdn Bhd as E the owner of the Target Shares;

(2) A declaration that the Target Shares and/or the proceeds is held by the 2nd Defendant as constructive trustee for the Plaintiff;

(3) An order that the 2nd Defendant within 14 days from the service of this Order do remit to the Plaintiff the sum of RM6,073,983.97 F with interest at 5% per annum from 25.3.2022 until full settlement ("the Secured Sum") to the Plaintiff;

(4) The parties be at liberty to apply; and

(5) Costs of RM20,000.00 be paid to the Plaintiff, subject to allocator.

G **[3]** The defendants did not appeal against the order.

[4] For the purpose of compelling the second defendant to pay the secured sum, the plaintiff included in the order an indorsement under O. 45 r. 7(4) and as per Form No. 83(a) of Appendix A to the Rules that, if the second defendant failed to make that payment as ordered, then the Directors of the H second defendant, namely Dato' Mohd Abdul Karim bin Abdullah ("Dato' Mohd Abdul Karim"), Abdul Kadier Sahid ("Abdul Kadier"), Awang Daud bin Awang Putera ("Awang Daud") and Abu Bakar bin Hamzah ("Abu Bakar") (collectively, "the Directors") would be liable to process of execution for the purpose of compelling them to obey it.

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[5] Under O. 45 r. 7(3)(a) of the Rules, the order was to be served personally on the Directors. However, the plaintiff faced difficulties in doing so, as affirmed by the process servers in the affidavits of non-service which were filed in encls. 44 and 46:

(i) As against Dato' Mohd Abdul Karim, attempts were made to serve him with the order at the first defendant's office and at his known residential address in Shah Alam, Selangor, to no avail;

(ii) As against Abdul Kadier, Awang Daud and Abu Bakar, attempts to serve the order on each of them at their known residential addresses in Bintulu, Sarawak also met with similar failure.

[6] On 13 July 2022, pursuant to the liberty to apply provision in the order, the plaintiff then filed an application in encl. 48 ("the plaintiff's application"):

(i) For an order under O. 45 r. 7(7) of the Rules to dispense with personal service of the order on the Directors;

(ii) For an order that service of the order on the second defendant's solicitors be deemed good and sufficient service on the Directors; and

(iii) Alternatively, for an order of substituted service of the order on the Directors:

(a) by pre-paid registered post to the Directors at the address at which personal service of the order had been attempted; or

(b) by posting a copy of the order on the notice board of the court and by advertisement in a local English language newspaper.

[7] Apart from dispensing with personal service of the order and substituted service of it on the Directors, the plaintiff further sought an order for substituted service of all future cause papers and orders in respect of committal proceedings filed by the plaintiff against the Directors:

(i) by way of service on the second defendant's solicitors;

(ii) by pre-paid registered post to the Directors at the address at which personal service of the order had been attempted; and

(iii) by posting a copy thereof on the notice board of the court.

I note that the plaintiff did not seek any order to advertise the committal cause papers in a local newspaper, English or otherwise, like it did with the order, *albeit* in the alternative.

[8] The plaintiffs application came up for hearing before me on 2 August 2022, by which time learned counsel for the plaintiff had creditably and pragmatically prepared and submitted in advance to the court a plaintiff's written submission accompanied by a bundle of authorities on the plaintiff's

A application so as to be heard on it post-haste. Counsel for the defendants was also present. After outlining the plaintiff's case, learned counsel for the plaintiff then requested me to defer my decision on the plaintiff's application to enable him to discuss with learned counsel for the defendants whether her firm was prepared to accept service of the order for an on behalf of the
B Directors, even though her firm was not on record as representing them. If so, it would dispense with me having to even decide the plaintiff's application. I concurred and fixed the plaintiff's application for decision on 12 August 2022.

[9] When they appeared before me again as scheduled on 12 August 2022,
C learned counsel for the defendants confirmed that her firm had instructions from the Directors to accept service of the order for and on their behalf, thereby waiving personal service of it. On that basis, learned counsel for the plaintiff then orally applied to withdraw the plaintiff's application with no order as to costs. With no objections to that from learned counsel for the
D defendants, I accordingly struck it out.

[10] However, as I was ready to render my decision on the plaintiff's application with the draft of this written judgment in progress, I decided to firm it up and issue it despite the withdrawal/striking out of the plaintiff's application. This is because it deals with not only dispensing with personal
E service on the Directors of the company of a mandatory order that was made against a company, but also several other issues. I will also at the end conclude with what decision I would have made had the plaintiff informed me he had instructions to proceed the plaintiff's application and receive my decision on it.

F **[11]** The issues raised by the plaintiff's application which I propose to deal with in this judgment are:

(i) When and in what circumstances can an order be made pursuant to O. 45 r. 7(7) of the Rules to dispense with personal service of a
G mandatory order?

(ii) Where an order is against a company and the Rules require that its directors are required to be personally served with it, can the court make an order that personal service on the directors be sufficient and satisfied by service on the solicitors of the company?

H (iii) Can the court make an order dispensing with future service of cause papers that the Rules require must be personally served, particularly in committal proceedings?

Dispensing With Personal Service Under O. 45 r. 7(7) Of The Rules

I **[12]** As O. 45 r. 7 of the Rules pertains to "Service of copy of judgment or order prerequisite to enforcement under r. 5", it would perhaps be pertinent to look at that r. 5 first.

[13] Rule 5 of O. 45 of the Rules is about enforcement of a judgment to do or abstain from doing an act by an order of committal. Under sub-r. (1)(B), where the judgment or order to do or abstain from doing an act is against a company, then the order of committal would be "against any director or other officer of the company."

[14] Order 45 r. 7(3) requires the judgment or order to be personally served on the officer if the company against whom the order of committal is intended:

> Subject as aforesaid, an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in rule 5(1)(B) or (C) unless a copy of the order has also been served personally on the officer against whom an order of committal is sought.

[15] Order 45 r. 7(7) which the plaintiff seeks to invoke is to dispense with that personal service:

> Without prejudice to its power under Order 62, rule 5, the Court may dispense with service of a copy of an order under this rule if it thinks it just to do so.

[16] For completeness, O. 62 r. 5 mentioned in r. 7(7) concerns substituted service of any document which is required to be served personally but where it appears to the court that it is impractical to do so.

[17] From these provisions, the context and purport of the plaintiff's application is clear: the plaintiff is alleging that it is impractical to serve the order personally on the Directors and is therefore seeking to dispense with the requirement under O. 45 r. 7(3) for it to be served on them personally, with alternative methods of service proposed *in lieu* of personal service. Then, after that alternative service has been effected, the plaintiff intends to pursue an order of committal against them if they thereafter still fail and/or refuse to procure the payment by the second defendant of the secured sum to the plaintiff.

[18] In its written submission, the plaintiff relied on only once case authority, namely the decision of Wong Chee Lin JC (as she then was) in *Neptune Aviation Ltd v. Sheikh Salleh Sheikh Abod & Anor (No. 3)* [2019] 4 CLJ 408, in which Her Ladyship had dispensed with personal service of a mandatory order.

[19] In paras. [23] to [28] of her judgment, she had referred to four case authorities, which had also dispensed with personal service of a mandatory order. On my request, learned counsel for the plaintiff had obliged me by compiling them in a bundle aptly named "The plaintiff's additional authorities". They are:

(i) The English Court of Appeal case of *Davy International Ltd & Ors v. Tazzyman & Ors* [1997] 3 All ER 183;

A (ii) The Hong Kong Court of Appeal case of *AXA China Region Insurance Co Ltd v. Li Yu Ping Ellen* [2002] 3 HKC 339;

(iii) The Singapore High Court decision in *OCM Opportunities Fund II, LP & Ors v. Burhan Uray (alias Wong Ming Kiong) & Ors* [2005] 3 SLR(R) 60; and

B (iv) The Malaysian High Court decision in *Madlis Azid & Ors v. Chua Yung Kim & Ors* [2013] 2 CLJ 110.

[20] The common thread running through all five cases is that the court was of the view that it would be just to dispense with personal service of the C mandatory order because the facts of the case showed that the person against whom it was made had full knowledge of the order and its terms:

(i) In *Neptune Aviation*, the first defendant, the plaintiff's managing director, had been ordered by injunction to return to the plaintiff the documents which he had allegedly removed from the plaintiff's premises. Personal D service of that order was dispensed with because:

(a) Through his solicitors, he notified the plaintiff's solicitors of an appointed date and time on which he would comply with the injunction and return the documents;

E (b) The documents the first defendant returned to the plaintiff was under cover of a letter he personally signed, which referred to the injunction; and

(c) In opposing the plaintiff's application for an order of committal, he had disputed the plaintiff's allegation that he had failed to fully F comply with the injunction.

(ii) in *Davy International Ltd,* the *Anton Pillar* Order (APO) against the office of the fourth defendant company was served there on someone who had identified herself as a senior employee of the fourth defendant. The first respondent, a director of the fourth defendant and against whom the G plaintiff sought an order of committal, had sworn an affidavit in purported compliance with the APO, thereby demonstrating knowledge of the terms of the APO.

(iii) In *AXA China Region Insurance Co*, the plaintiff had filed the action against the defendant, an ex-insurance agent of the plaintiff, alleging that H she had used the plaintiff's documents to induce the plaintiff's insurance policy holders to surrender those policies and take up new policies with her new employer. The plaintiff obtained an injunction against her to deliver up to the plaintiff all such documents in her possession, which injunction order was then supplemented by a second order. On the I plaintiff's contention that she had failed to comply with it, she affirmed an affidavit referring to both orders, including averring that she had been advised by her legal advisers of "the serious consequences of not complying with the court order."

(iv) In *OCM Opportunities Fund II*, the plaintiff moved committal proceedings against the alleged contemnors on their failure to comply with a *Mareva* injunction and their disclosure obligations under the injunction, and on their failure to comply with an order to attend court to be cross-examined on their affidavits in support of their application to set aside the injunction. Despite not filing any affidavit to resist the committal proceedings, they opposed it on the ground they had not been personally served with those orders. Belinda Ang Saw Ean J dispensed with personal service of all of the orders, *inter alia*, because:

(a) their appointed solicitors had accepted service of the orders;

(b) their affidavits in support of their application to set aside the injunction showed that they were aware of it and the consequences of non-compliance;

(c) in the circumstances they were "undoubtedly aware of the terms of the orders and were also alive to the consequences of non-compliance", and

(d) through their solicitors "their activities were in relation to various applications to forestall compliance with the disclosure orders and cross-examination."

(v) In *Madlis Azid*, after a full trial the plaintiffs obtained an order against the first defendant to deliver up the title deeds to 98 parcels of native lands so that they could be reinstated as the rightful owners thereof, and then moved committal proceedings against him when he refused to comply. Supang Lian J (as Her Ladyship then was) rejected the first defendant's objection that he was not personally served with the order and dispensed with personal service of it because:

(a) He knew about the order since it was specifically endorsed in the writ, and therefore he knew of it throughout the entire proceedings;

(b) His solicitors were present when judgment was pronounced, and they had approved the draft judgment, and had accepted service of the sealed judgment on his behalf;

(c) He had instructed his solicitors to apply to stay execution of the judgment and had referred to the judgment in his affidavit in support of that application;

(d) The fact that his solicitors had appealed against the judgment and filed his application for the stay within the time prescribed by the rules indicated that:

> As would be expected of any competent and responsible solicitors, they would have advised the first defendant of his rights and duties under the judgment

[21] In our ease, save for Dato' Mohd Abdul Karim, there is no evidence that the other Directors had full knowledge of the order and its terms. Dato' Mohd Abdul Karim may have, as he had affirmed two affidavits in these proceedings, both of which referred to the originating summons which contained the order for payment by the second defendant to the plaintiff of the secured sum.

[22] Even so, it must be noted that he affirmed the affidavits through the solicitors of the defendants, not his own solicitors, which was quite different from the scenario in *Madlis Azid* where the first defendant was a party to the action from its inception and the solicitors were appointed by him.

[23] Thus, in these circumstances and absent any evidence that the other Directors had full knowledge of the order and its terms, I would not have ordered dispensation of personal service of the order against them.

[24] I would also caution parties from using this decision and those case authorities as a basis to purposely overlook and dispense with service of a mandatory order, more so when the intended next step is committal proceedings. The rules of court should primarily be obeyed, and parties seeking to dispense with service of a mandatory order against the express requirement of personal service under O. 45 r. 7(3) must adduce valid and reasonable grounds for establishing that it would be just to do so, more so in this instance where committal proceedings may result. They run the risk of having those proceedings rejected or worse, overturned, if they are found to have unjustifiably failed to personally comply with the formal requirements of service as prescribed by the Rules.

Service On The Solicitors Of The Company *In Lieu* Of Service On Its Directors

[25] There are in my mind two main reasons why service on the solicitors of the company cannot be accepted as service on its directors.

[26] Firstly, it is trite law that a company and its directors are separate legal entities. Service on solicitors appointed by a company does not at all mean they are also the directors' solicitors, even if they are being instructed by them.

[27] Secondly, under O. 62 r. 13 of the Rules, a solicitor would only be authorised to accept service of cause papers in an action where the opposite party has been given notice in writing to that effect, either by the party or by the solicitors. Absent such notice, the defendants' solicitors would have no such authority, and any service on them would not be good and valid service on the Directors.

Dispensing With Future Service Of Cause Papers That Must Be Personally Served, Particularly In Committal Proceedings

[28] Committal proceedings is governed by O. 52 of the Rules. Under r. 3(1):

> No application to a Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.

[29] Where leave has been granted under r. 3 to apply for an order for committal, then under r. 4(1):

> ... the application for the order must be made by notice of application to the Court, and, unless the Court granting leave has otherwise directed, there must be at least eight clear days between the service of the notice of application and the day named therein for the hearing.

[30] Under r. 4(3), the notice, statement and affidavit in support of the application for an order of committal must be served personally on the person sought to be committed.

[31] Rule 4(4) is almost identical to O. 45 r. 7(7), in that it provides:

> Without prejudice to the powers of the Court or Judge power under Order 62, rule 5, the Court or Judge may dispense with service of a copy of an order under this rule if it or he thinks it just to do so.

[32] Despite the slight difference in the words of these two provisions, the purport and ambit is the same, namely that personal service may be dispensed with if the court or the judge "thinks it just to do so."

[33] It is therefore clear that, based on its failure and/or inability to serve the order on the Directors, what the plaintiff is seeking here is an order not just to dispense with service of the order, but also to dispense with personal service of the notice of application, statement and affidavit in support of its application for committal against the Directors in the subsequent committal proceedings, should the Directors fail to comply with the order and it obtains leave to apply for an order for committal against them under O. 52 r. 3(1) of the Rules.

[34] The short answer to this issue is that I have no power or jurisdiction to dispense with the service of those cause papers in the committal proceedings. My remit at the present is confined to deciding whether to dispense with personal service of the order, under O. 45 r. 7(7) of the Rules.

[35] The intended committal proceedings resulting from any failure by the Directors to comply with the order is something for the future, under entirely different proceedings under O. 52, which has its own process.

[36] Any failure by the Directors to comply with the order must first be addressed by the plaintiff applying for and obtaining leave under O. 52 r. 3 to apply for an order of committal against them. If the plaintiff does obtain leave, the resulting application, statement and affidavit which must then be served personally on the Directors.

[37] Any dispensation of personal service of those cause papers would be under O. 52 r. 4(4). That would have to be decided on the circumstances surrounding all of those proceedings under O. 52. Whether or not it would be just to dispense with service would be on the facts and circumstances in those proceedings, not on the facts and circumstances deposed in the affidavits filed in support of the plaintiff's application here. In short, the current facts and circumstances cannot dictate what should be ordered in the future, which must be decided on its own facts.

[38] Furthermore, if I were to now order dispensation with service of the cause papers on the committal proceedings, I would be exceeding my current remit and impinging on and usurping the discretion, powers and jurisdiction of the court hearing those committal proceedings. I cannot do that.

Conclusion

[39] In conclusion, had the plaintiff on 12 August 2022 requested me to deliver decision, I would have dismissed it with costs.